

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RONG DONG LI,

Plaintiff,

vs.

AKAL SECURITY, INC., et al.,

Defendants.

CASE NO. 10cv2465-LAB (BGS)

**ORDER GRANTING IN PART AND
DENYING IN PART AKAL'S
MOTION TO DISMISS**

On April 3, 2011, the Court dismissed with prejudice most of Li's claims against Akal Security. One claim, for the negligent infliction of emotional distress, survived. The Court found that Li hadn't stated adequate facts to support that claim, but it allowed him the opportunity to do so in amended complaint. Now before the Court is Akal's motion to dismiss Li's First Amended Complaint. In addition to alleging the negligent infliction of emotional distress, Li also alleges basic negligence.

I. Introduction

Li, an illegal immigrant and detainee at the El Centro Service Processing Center ("Detention Center"), alleges that Akal Security is liable for personal injuries he sustained when two other detainees attacked him in a bathroom. Akal is a private security company that provided security for the Center pursuant to a contract with United States Immigration and Customs Enforcement.

Li's story is straightforward. He entered the men's restroom at the Detention Center and saw two men fighting. He alerted guards, who came quickly, broke up the fight, and escorted the two men from the restroom. As he was washing his hands, after using the restroom himself, one of the men who had been fighting, joined by another man, entered the restroom and attacked Li. The attack lasted for three to four minutes, leaving Li bloody with injuries to his face and body.

II. Legal Standard

A rule 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering such a motion, the Court accepts all allegations of material fact as true and construes them in the light most favorable to Li, the non-moving party. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). To defeat a 12(b)(6) motion, a complaint's factual allegations needn't be detailed, they must simply be sufficient to "raise a right to relief above the speculative level" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, "some threshold of plausibility must be crossed at the outset" before a case can go forward. *Id.* at 558 (internal quotations omitted). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

While the Court must draw all reasonable inferences in Li's favor, it need not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotations omitted). In fact, the Court does not need to accept any legal conclusions as true. *Iqbal*, 129 S.Ct. at 1949. A complaint does not suffice "if it tenders naked assertions devoid of further factual enhancement" (*id.* (internal quotations omitted)), nor if it contains a merely formulaic recitation of the elements of a cause of action (*Bell Atl.*

1 *Corp.*, 550 U.S. at 555).

2 **III. Discussion**

3 Li's grievance, in essence, is that Akal Security failed to protect him from the
 4 aggressions of fellow detainees at the Detention Center. Typically, this is a civil rights claim
 5 brought by prisoners under the Eighth Amendment, and it requires that prison officials
 6 demonstrate "deliberate indifference" to "conditions posing a substantial risk of serious
 7 harm." *Clem v. Lomelli*, 566 F.3d 1177, 1181 (9th Cir. 2009) (quoting *Farmer v. Brennan*,
 8 511 U.S. 825, 834 (1994)). Li doesn't allege, though, that his Eighth Amendment rights were
 9 violated by Akal. He simply accuses Akal of negligence: (1) for failing to station guards
 10 outside of the restroom to respond to emergencies therein; (2) for *its employees'* failure to
 11 respond to Li's cries for help from within the restroom; (3) for *its employees'* failure to
 12 segregate or detain the man Li had seen fighting, and who subsequently attacked Li; and
 13 (4) for failing to investigate the original fight. (Compl. ¶ 37.)

14 A negligence claim is not implausible. "Tort law . . . imposes a duty of care on jailers
 15 or prison employees to protect the life and health of prisoners in their custody and protect
 16 the prisoners from foreseeable harm or unreasonable risk of physical harm." *See Pollard*
 17 *v. GEO Group*, 607 F.3d 583, 609 (9th Cir. 2010), *overruled on other grounds by Minneci*
 18 *v. Pollard*, 2012 WL 43511 (Jan. 10, 2012). Akal acknowledges this principle, but attempts
 19 to distinguish itself on the ground that it is a private security company at a detention center,
 20 and thus had no duty of care to protect Li in the first instance:

21 Here, Plaintiff has failed to allege how he has a "special
 22 relationship" with an unidentified Akal employee. Specifically,
 23 Plaintiff has failed to allege how unidentified employees of Akal,
 24 a private security company, owe a duty of care to protect an
 25 illegal immigrant from harm at a detention center, such that Akal
 26 can be held vicariously liable for negligence . . . Akal's counsel
 27 is not aware of any published California case extending the
 28 "special relationship" rule such that *unidentified* employees of a
private security company owe a duty of care to an *illegal*
immigrant detainee."

(Br. at 7.)

It is reasonable of Akal to question whether, as a private *security* company, it had a
 duty to protect Li. In the Court's judgment, this turns on the exact nature of Akal's contract

1 with the United States—and probably with Immigration and Customs Enforcement—at the
 2 Detention Center. On the one hand, Li alleges that Akal has a contract to “provide security
 3 services.” (Compl. ¶ 2.) This could mean anything. It could mean that private security
 4 officers simply oversee the grounds and the parking garage (as at the federal courthouse
 5 in San Diego), in which case they can’t be considered to have the same duties of care as
 6 actual jailors or prison employees. On the other hand, it could mean that Akal basically runs
 7 the Detention Center. Li alleges the latter, more or less:

8 Akal had the physical custody of the detainees and had a duty
 9 to assure the safety and security of detainees such as Plaintiff
 10 while they were detained at the Center. Plaintiff believes and
 11 thus alleges that twenty-four hours a day detainees at the Center
 were under close monitoring and supervision by Akal’s
 employees including the men’s bathroom where Plaintiff was
 brutally attacked.

12 (Compl. ¶ 36.) Assuming these to be the facts, as the Court must in ruling on a motion to
 13 dismiss, Akal is no different from any private company with a contract to run a correctional
 14 facility, and that may be held liable for violations of inmate’s constitutional or common-law
 15 rights.¹ The Court therefore finds that Akal does have a duty of care with respect to Li, and
 16 that the duty encompasses an obligation to protect him from foreseeable harms inflicted by
 17 third parties.

18 The key word there, though, is “foreseeability,” which the court in *Giraldo* recognized
 19 was “the most important consideration in establishing duty.” *Id.* at 386 (internal quotations
 20 omitted). Even if the Court accepts that Akal had a general duty to protect Li from harms

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 22 ¹ The Court sees no reason to exempt Akal because the Detention Center is not,
 23 technically, a prison or other correctional facility. A defendant may have an affirmative duty
 24 to protect a plaintiff from the conduct of third parties when there is a special relationship
 25 between the two parties. *Giraldo v. Cal. Dep’t of Corrections and Rehabilitation*, 168
 26 Cal.App.4th 231, 245 (Cal. Ct. App. 2009). A special relationship typically arises where “the
 27 plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly,
 28 has some control over the plaintiff’s welfare.” *Id.* at 245–46 (quoting *Kockelman v. Segal*,
 61 Cal.App.4th 491, 499 (Cal. Ct. App. 1998)). The court in *Giraldo* was concerned
 particularly with the relationship between a jailer and prisoner, and it passed on the question
 of “[w]ho comes within the category of jailer.” *Id.* at 253. Nonetheless, it recognized that
 “important factors in determining whether a relationship is ‘special’ include vulnerability and
 dependence,” and that a prisoner “is deprived of the normal opportunity to protect himself
 from harm inflicted by others.” *Id.* at 386. These factors may be just as present in a
 detention center for illegal immigrants as an actual prison, and the Court sees no reason not
 to extend the tort principles recognized in *Giraldo* to the facts of this case.

1 inflicted by a third party, the duty extends only to those harms that are foreseeable. This is
 2 where Li's complaint runs into problems. He alleges nothing more than that he reported a
 3 fight in the bathroom to an Akal security guard, the two men fighting were escorted out of the
 4 bathroom, and within moments one of the men came back into the bathroom and attacked
 5 him. When the Court first dismissed Li's negligent infliction of emotional distress claim, it
 6 observed:

7 Li isn't even clear on what he believes was negligent: Akal
 8 releasing the men who been fighting, knowing they had a
 9 propensity to violence, or Akal not responding when Li was
 10 crying for help during the alleged attack. If the former, Li
 11 certainly doesn't allege adequate facts. He doesn't explain how
 12 the men were fighting, whether they resisted being escorted
 away, whether they said anything to Li or hinted that they would
 be back to retaliate against him, or any other facts that would
 allow for the reasonable inference that Akal shouldn't have
 released the men and looked the other way.

13 (Dkt. No. 9 at 4–5.) Li still doesn't allege those facts. Li *admits* he doesn't allege those
 14 facts. (Opp'n Br. at 3.) To be fair, it's now clear that Li believes Akal was negligent for
 15 releasing the fighting men *and* failing to respond to his cries for help, but he hasn't alleged
 16 any additional facts in his First Amended Complaint that explain why it was foreseeable that
 17 either (a) fights would break out in the bathroom requiring Akal to station security guards
 18 outside of it, or (b) one of the men in the fight that Li reported would return to the bathroom
 19 to retaliate against Li. So, still, Li alleges no facts, as the Court said previously, "that would
 20 allow for the reasonable inference that Akal shouldn't have released the men and looked the
 21 other way." He asserts in a conclusory manner that "Akal knew or should have known that
 22 John Doe One is a risk to other detainees, in particular, to Plaintiff who had just reported him
 23 to guards." (Compl. ¶ 37.) Li has to say more, though, to give rise to a reasonable
 24 inference that it was foreseeable that John Doe One, simply in virtue of being in a fight that
 25 Li reported, would seek Li out to retaliate against him. Li's negligence claim therefore fails
 26 to the extent it is based on Akal's alleged failure to station guards near the restroom, or its
 27 alleged failure to segregate John Doe One from the remainder of the detainee population.

28 To the extent Li's negligence claim is based on the allegation that he took a beating
 for 3-4 minutes in the Detention Center's bathroom and Akal's security guards *must* have

1 heard him and did nothing, it is more plausible. But it's not clear that this is Li's claim. He
2 says,

3 Akal breached its duty . . . through the failure of its employees
4 who were stationed near the men's restroom at the time of the
5 incident to respond to Plaintiff's plea for help since it is
6 impossible for them not to hear Plaintiff's loud plea had any of
7 Akal's employees were stationed near the men's bathroom at
8 issue.

9 (Compl. ¶ 37.) This sentence is unclear. On one hand, Li seems to be alleging that he
10 pleaded for help and Akal's guards must have heard him. On the other hand, Li is alleging
11 that guards must have heard him *had* they been stationed outside the restroom, but the
12 Court has already determined this cannot be the basis of a negligence claim because Li
13 alleges insufficient facts to show that bathroom fights were so foreseeable that guards
14 should have been stationed outside of it. Elsewhere in his complaint, Li alleges that "[w]hile
15 it only takes seconds for guards to respond, no guards ever came to Plaintiff's rescue."
16 (Compl. ¶ 11.) He also alleges that his "severe and permanent injuries could have been
17 avoided had Akal responded to Plaintiff's loud pleas for help." (Compl. ¶ 38.) Missing in all
18 of these allegations is the unambiguous charge that Akal guards must have heard Li's pleas
19 for help and chose to do nothing about them. The Court will give Li the benefit of the doubt,
20 though, and charitably interpret his complaint to allege that guards did hear him plead for
21 help from the bathroom and did nothing about it. Akal's motion to dismiss is **DENIED**, but
22 Li's negligence and negligent infliction of emotional distress claims survive only to the narrow
23 extent that they are based on the failure of Akal security guards to respond to pleas for help
24 they must have heard. To the extent the negligence claims have any other basis, Li has
25 failed to allege adequate facts to support them and they are dismissed.

26 The last matter to resolve is whether Li may seek punitive damages, which he inserts
27 into both his negligence and negligent infliction of emotional distress claims. Akal is right to
28 ask that the request be stricken. Li alleges no facts to support the imposition of punitive
damages, seeks them in a completely conclusory manner, and indeed, punitive damages
cannot be staked on negligence claims as a matter of law. *See Food Pro Intern., Inc. v.*
Farmers Ins. Exchange, 169 Cal.App.4th 976, 994 (Cal. Ct. App. 2008); *Woolstrum v.*

1 *Mailloux*, 190 Cal.Rptr. 729, 735 (Cal. Sup. Ct. 1983) (“Conduct which may be characterized
2 as unreasonable, negligent, grossly negligent or reckless does not satisfy the highly culpable
3 state of mind warranting punitive damages.”).

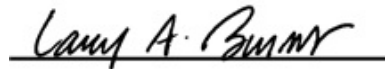
4 **IV. Conclusion**

5 Li’s negligence claims against Akal may proceed on one narrow construction—that
6 Akal security guards were negligent in their failure to respond to Li’s pleas for help during the
7 three to four minutes that he was attacked in the restroom of the Detention Center. Li may
8 not seek punitive damages for this alleged negligence.

9 The Court notes that the United States and Robin Baker have not responded to Li’s
10 complaint. Li claims to have served them on October 11, 2011, and under Fed. R. Civ. P.
11 12(a)(3) their responses were due on December 12, 2011. The Court has doubts, though,
12 that these Defendants were properly served under Fed. R. Civ. P. 4(i). Li must therefore
13 show cause, within 14 days of the date this Order is entered, why service of these
14 Defendants was proper. If Li does not respond within 14 days, he will have failed to serve
15 the Defendants in a timely manner under Fed. R. Civ. P. 4(m) and the Court will dismiss his
16 claims against them without prejudice.

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18 **IT IS SO ORDERED.**

19 DATED: January 17, 2012

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21 **HONORABLE LARRY ALAN BURNS**
22 United States District Judge
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